

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

CARVER CONCRETE CONSTRUCTION,
INC.

Employer

and

OPERATIVE PLASTERERS AND CEMENT
MASONS LOCAL UNION #18 OF
CENTRAL ILLINOIS

Case 33-RC-4723

Petitioner

and

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 362

Case 33-RC-4724

Petitioner

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 649, AFL-CIO

Case 33-RC-4727

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTIONS

The Employer, Carver Concrete Construction Inc., is an Illinois corporation engaged excavation, concrete foundation and flatwork on primarily residential construction projects located in central Illinois. The Petitioners, Operative Plasterers and Cement Masons Local Union #18 of Central Illinois ("Cement Masons"), Laborers International Union of North America, Local 362 ("Laborers"), and International Union of Operating Engineers Local 649, AFL-CIO ("Operating Engineers") each filed a

petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent separate units of the Employer's flatwork crews (33-RC-4723), wall crews, including stripping crew and footing crew (33-RC-4724) and equipment operators (33-RC-4727). A hearing officer of the Board held a hearing and the parties filed briefs.

As evidenced at the hearing and in the briefs, the parties disagree on two issues: (1) whether a unit of just the crew members petitioned for by each of the unions is appropriate and (2) whether Pete Conlin, Chris Shanks and Robert Miller are statutory supervisors who should be excluded from any unit found appropriate.¹ The Employer contends that the units proposed by the Petitioners are under-inclusive because of significant overlap in job duties of several of its employees and, instead, proposes three units organized generally along the lines of the work traditionally performed by cement masons, laborers, and operating engineers, with many employees being in more than one unit. The Employer also contends that Pete Conlin, Chris Shanks and Robert Miller are not statutory supervisors.

I have considered the evidence and the arguments presented by the parties on both of these issues. As discussed below, I conclude that the petitioned-for units of flatwork crews and wall crews (including the stripping and footing crews) are appropriate. I also

¹ Initially, the Operating Engineers asserted that only the operators working out of the Employer's Bloomington, Illinois facility and not its Champaign, Illinois facility should be included within the scope of the unit because the union's geographical jurisdiction does not include the Champaign facility. All other parties were in agreement that employees at both locations should be included in the scope of the unit. On brief, the Operating Engineers apparently abandoned its position on this issue and, rightly so, because a union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968). In any event, the evidence establishes the Employer's "facility" in Champaign is comprised of rented warehouse space used for storing equipment and inventory and as a frequent meeting place for one of the Employer's wall crews. Under a traditional single v. multi-location analysis, in light of the centralized control of labor relations, conditions of employment, supervision, skills, geographical proximity, and contact and interchange of employees, a unit comprised of both the Bloomington and Champaign facilities is appropriate. *The Kendall Company*, 184 NLRB 847 (1970); *Kent Plastics Corp.*, 183 NLRB 612 (1970).

conclude that a unit of operators/drivers, as petitioned for, as well as the Employer's mechanic, is appropriate. In addition, I conclude that the record does not establish that Pete Conlin, Chris Shanks and Robert Miller are statutory supervisors; therefore, they should be included in the same unit as their respective crews. Accordingly, I have directed elections in a unit of flatwork crew employees; unit of wall crew employees, including the stripping and footing crew employees; and a unit of excavating crew employees, operator/drivers, and the mechanic.²

To provide a context for my discussion of these issues, I will first provide an overview of the applicable law. Then I will present in detail the facts and reasoning that support my conclusions.

I. DETERMINING THE APPROPRIATE UNIT

A. Applicable Law

Section 9(b) of the National Labor Relations Act directs the Board to “decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.” “[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, ‘if not final, is rarely to be disturbed.’” *South Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976)(citation omitted). There is nothing in the Act that requires the unit for bargaining be the only appropriate unit or the most appropriate unit – the Act only requires that the unit for bargaining be “appropriate” so as to assure employees the fullest freedom in exercising

² There are approximately 15 employees in the flatwork crew unit, 24 employees in the wall crew unit, and 13 employees in the excavating crew, operator/drivers and mechanic unit.

the rights guaranteed by the Act. *Overnite Transportation Co.* 322 NLRB 723 (1996); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenix Resort Corp.*, 308 NLRB 826 (1992). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees “unless an appropriate unit compatible with that requested does not exist.” *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963); See *Bamberger’s Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores*, 160 NLRB 651 (1966). Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, e.g., *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963), cert. denied 375 U.S. 965.

The Board gives deference to the Union’s petition and first considers whether that unit is appropriate. See *Overnight Transportation Company*, 322 NLRB 723 (1996); and *P.J. Dick Contracting*, 290 NLRB at 151. If it is an appropriate unit, the inquiry ends. If not, the Board will scrutinize the Employer’s proposals. See *Black and Decker Mfg. Co.*, 147 NLRB 825, 828 (1964); and *Dezcon, Inc.*, 295 NLRB at 111.

In order for the Board to decide whether the petitioned-for units are appropriate, the Petitioners must demonstrate that the employees in the petitioned-for units share a sufficient “community of interest.” *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). To this end, the Board has enumerated several factors, which it utilizes in determining whether a given group of employees have a sufficient community of interest to form an appropriate unit. These include: similarity in the scale and manner of determining earnings; similarity in employment benefits, hours of work and other terms and conditions of employment; similarity in the kind of work performed; the qualifications, skills and training of employees; frequency of contact and

interchange among employees; integration of production processes; common supervision; determination of labor relations policy, and the history of collective bargaining. See *Kalamazoo Paper Box Corporation*, 136 NLRB 134, 137 (1962).

Moreover, in the construction industry, the Board has repeatedly held that a craft unit or a departmental unit is an appropriate unit. *Hydro Constructors*, 168 NLRB 105 (1967); *R.B. Butler Inc.*, 160 NLRB 1595 (1966); *Burns and Roe Services Corporation*, 313 NLRB 1307 (1994). A craft unit is a “distinct and homogenous” unit of journeymen, apprentices and helpers who are primarily engaged in tasks not performed by others that require substantial craft skills and the use of specialized tools and equipment. *Burns and Roe Services Corporation*, 313 NLRB 1307, 1308 (1994). The Board has also approved of a unit that is not a craft or departmental unit but that nonetheless constitutes a clearly identifiable and functionally distinct group with common interests distinguishable from those of other employees. *Brown & Root, Inc.*, 258 NLRB 1002, 1003 (1981); *ECM, Inc.*, 264 NLRB 1077 (1982); *S. J. Groves and Sons Company*, 267 NLRB 175 (1983).

With this overview of the law in mind, we turn to a discussion of the Employer’s operations.

B. Discussion of Employer’s Operations

1. Type of Work

The Employer is a concrete contractor, engaged in the business of excavating basements, constructing concrete footings and walls, and pouring and finishing basement floors, driveways, garage floors and sidewalks on primarily residential projects in central Illinois. The projects are generally within a 60-mile radius of Bloomington, Illinois.

2. Facilities

The Employer has a facility in Bloomington, consisting of a combined office and warehouse, a mechanic shop, and a fenced yard where equipment and inventory are kept. The Employer also rents warehouse space for storing inventory and, occasionally, trucks in Champaign, Illinois, about 50 miles from Bloomington.

3. Ownership

Brian Carver and Ed Cushing are each 50% owners of the business and president and vice president, respectively. Brian Carver handles the field operations and Ed Cushing handles the office and finances of the business.

4. Employees

The Employer employs approximately 55 to 60 employees, assigned to various crews -- four wall crews (including a footing crew and stripping crew),³ two flatwork crews, and two two-man excavation crews -- as well other employees who, on an individual basis, operate equipment and drive trucks.⁴ The Employer also employs a mechanic. This workforce undoubtedly decreases somewhat because, as Employer President Brian Carver testified, the work slows down a bit on a seasonal basis.

5. Skills and Qualifications

Although the employer does not require any particular job-related skills or qualifications before hiring its wall or flatwork crew employees, it does prefer, and sometimes advertises for, employees experienced in a particular skill, such as concrete

³ The wall crews are sometimes referred to in the record as “foundation crews.”

⁴ The evidence revealed that no employees simply drive a truck. Rather, the record establishes that employees who drive trucks also operate equipment. Accordingly, as used in this decision, the term “operator/drivers” refers to employees who just operate equipment and those that both operate equipment and drive trucks for the Employer.

laborers or cement finishers. New employees lacking experience are typically given on-the-job training by more experienced employees.

The Employer apparently also prefers to hire experienced operator/drivers and requires commercial drivers' licenses for some of these employees.

6. Equipment

The Employer utilizes bobcats, excavators, backhoes, dump trucks, tandem trucks and crew trucks to perform its work, haul its equipment and transport its employees.

7. Job Progression and Crew Responsibilities

The Employer completes between 200 to 250 jobs a year, with several jobs in various stages of progress on any given day. Every morning Brian Carver meets with the employees and hands out the assignments to the crews. Although most of the employees report for work at the Employer's Bloomington facility for these assignments, some report directly to the job site. Others, who live near Champaign and work on a wall crew on jobs primarily in that area, will sometimes congregate at the Employer's warehouse there before traveling to the job site. The Employer sometimes has this "Champaign" crew work on jobs in the Bloomington area and its "Bloomington" crews work on jobs in Champaign.

The Employer performs its work in the following sequence, with each crew of employees performing their specified tasks then moving on to perform those same tasks at other job sites:

Once the Employer is awarded a job, one of three individuals -- Brian Carver, Chris Shanks or Pete Conlin -- stakes out the location of the house on the lot, using a metal detector, strings, stakes, hammer and tape measures.

Next, the excavating crew digs the sewer line and installs the sewer pipe, using a track excavator and a bobcat to accomplish this work. A city inspector inspects the sewers. If the sewer passes inspection, the excavating crew starts digging the basement with the excavator and the bobcat. The bobcat operator also checks the grade with a laser to make sure the elevations are correct. The excavating crew also digs the water line to the house. A plumber (not an employee of the Employer) installs the water line. The excavating crew puts rock in the hole. The rock is either brought in by one of the Employer's trucks and the excavator sets it in the hole or the rock is shot into the hole with a shooter truck. The excavating crew then backfills the water line and leaves the site.

The next day another wall crew (sometimes called the "footing crew") arrives on the job, sets the forms and pours the footings, where the foundation walls will be set. The next day the footing crew (or another wall crew sometimes called the "stripping crew") strips the forms off the footings and grades the rock. Another wall crew then arrives on the job, and sets the forms for the walls. An excavating crew employee, operating a boom truck, assists the wall crew by lowering a basket of the eight-foot by three-foot aluminum forms into the hole with the crane on the back of the truck. The boom truck leaves and the wall crew employees pour the concrete into the forms. The next day, the wall crew strips the forms and loads the forms into the basket. The boom truck returns, raises the basket out of the hole, and hauls the forms to the next jobsite.

All of the work done by the wall crews (including the footing and stripping crews) is done by hand, using rakes, shovels, etc.

After the wall forms are poured and stripped, a plumber (not an employee of the Employer) installs the underground plumbing for the basement floor. Next, the

excavating crew returns and, using bobcats and sometimes a track excavator, backfills the holes and garage, and places the rock and sand for the floors and driveways.

In the next step, the flatwork crew pours and finishes the basement and garage floors, using specialized tools, such as hand trowels, power trowels, magnesium float, joiners, and edgers. The flatwork crew also has a bobcat available to it at all times for intermittent digging and backfilling. Once this flatwork is completed, the crew leaves and the house is completed by other contractors.

When the house is completed, the Employer's flatwork crew returns to the site to pour the driveways and sidewalks. After the flatwork crew finishes and leaves, the excavating crew (sometimes called a "rough grading crew") dresses up the yards, backfills the concrete, cleans up the debris and hauls away the leftover dirt.

Throughout the concrete construction process, the Employer's mechanic services and repairs the Employer's trucks and equipment. It is unclear from the record how much time the mechanic spends in the shop or on the jobsite. Brian Carver testified that the mechanic spends 90% of his day at the Bloomington shop, but also that 50% of his time is spent at the job sites repairing equipment and trucks.

8. Wages and Benefits

With the exception of David Rudisill and Chris Shanks,⁵ all construction employees are paid hourly and receive overtime (at time and one half) after 40 hours. The Employer has different wage ranges depending on whether the employees are members of the wall crews, the flatwork crews or excavation crews (including the individual operator/drivers) or mechanics. Wall crew members receive between \$12.00

⁵ The terms and conditions of Rudisill and Shanks' employment will be discussed more fully in Section II of this decision ("Determining Supervisory Status).

and \$17.00 per hour. Flatwork crew members receive \$11.00 to \$22.00 per hour.

Excavating crew members and individual operator/drivers receive between \$14.00 and \$18.00 per hour. The working foremen of the wall crews and flatwork crews receive “slightly more” than the crew members. The mechanic receives between \$14.00 and \$15.00 per hour. All employees are paid each Friday.

Employees are evaluated after their probationary period and on the anniversary of their hire date. Carver and Cushing determine the amount of a raise, if any, based on merit, attendance, quality of work and attitude toward work.

All employees are eligible for the same health care benefits and the Employer’s “loan” program. Employees do not receive paid vacation.

9. Supervision

Brian Carver is primarily responsible for supervising the construction employees. He meets with the employees at the beginning of each day and assigns the crews to their jobs. He then spends the rest of the day, visiting the various jobsites and checking on the crews. When Carver is not able to check a job site, co-owner Ed Cushing does. The parties stipulated, and the record establishes, that Carver and Cushing have authority to hire and fire employees and direct their work and, therefore, that they are supervisors within the meaning of Section 2(11) of the Act.

Each of the wall and flatwork crews has at least one foreman who works alongside the other crew members. These working foremen are responsible for keeping the crew working and reaching the daily goals. The extent of their authority (or lack thereof) is more fully discussed below in Section II (“Determining Supervisory Status”).

10. Interchange Among Employees

Although wall crew employees frequently switch to other wall crews, the record revealed very little temporary or permanent interchange of employees between different types of crews or between the crews and the operator/driver or mechanic positions. Most of the testimony on this issue was general, with Brian Carver testifying that wall crew members “might” want to go to flatwork crews and that this “possibly” happened every two to three months.

The only specific examples of interchange discussed at the hearing were Caleb Fiscus and Aaron Wellman. Brian Carver testified that Fiscus was originally hired as a grade checker but since he wanted to work with walls he was moved to a wall crew. Carver also testified that Wellman was also hired as a grade checker, but since he excelled at operating a bobcat, the Employer decided to move him to excavating. Since it appears that “grade checking” is a task performed by different crews at various stages of the construction process, it is unclear whether Fiscus and Wellman actually changed crews when they were moved.

11. History of Collective Bargaining

There is no evidence of a collective bargaining relationship between the Employer and any union.

C. The Appropriate Units

Based on the record herein and the applicable law outlined above, I find that three separate units, one consisting of wall crew employees (including footing and stripping employees), one consisting of flatwork crew members, and one consisting of excavating crew employees (including operators/drivers) and the mechanic, are appropriate. In reaching this conclusion, I acknowledge that all of the Employer’s employees are subject

to common policies and benefits. However, this fact is outweighed by evidence that each unit is a clearly identifiable and functionally distinct group with common interests distinguishable from other employees. *Brown & Root, Inc.*, 258 NLRB 1002, 1003 (1981); *ECM, Inc.*, 264 NLRB 1077 (1982); *S. J. Groves and Sons Company*, 267 NLRB 175 (1983). The minimal amount of contact the employees have with each other and the two instances of interchange among employees is not sufficient to require a different result.

As discussed in detail below, each unit has separate, identifiable responsibilities on the jobsites, requires separate skills, and utilizes different tools than the other units. Members of each unit generally have little or no contact or with other employees, since the work is performed sequentially with crews being on the job site only when performing their particular function. Moreover, there is minimal interchange among employees.

1. Wall Crews

The wall crews (including the footing and stripping crews) are collectively responsible for setting forms and pouring concrete for footings and walls and removing the forms once they are finished. All of their concrete work is done by hand, using rakes, shovels, etc. They travel together to the job site, working all day together.

The wall crews have minimal contact with employees in the other units found appropriate. Other than at the Employer's Bloomington facility each morning, the wall crews interact with employees in other units only when the boom truck driver lowers and raises the forms into the holes for the wall crews to use. On these occasions, however, the boom truck driver leaves the site after lowering the forms and does not return until the

forms are ready to be removed. He then removes the forms then takes them to the next job site where they are needed. Thus, his contact with the wall crew is minimal.

Not only is contact between the wall crews and other employees minimal, but also interchange is minimal. Wall crew employees frequently switch from one wall crew to another – sometimes everyday. Wall crew employees rarely (if at all) transfer to and from flatwork or excavating crews. Upon this record, I am satisfied that the wall crews are a separate identifiable and functionally distinct group with their own community of interest and that the petitioned-for unit is wall crew employees is appropriate.

2. Flatwork Crews

Similarly, the flatwork crew is its own identifiable and functionally distinct group with common interests distinguishable from other employees. Their primary job is cement finishing. As Brian Carver testified, competent flatwork crew members are accomplished cement finishers – they can use a trowel to make the concrete smooth.⁶

Flatwork crew members use specialized tools: hand and power trowels as well as hand magnesium floats, joiners, and edgers. Although every flatwork crew has a bobcat, only some flatwork crew employees operate it to back fill and flatwork employees are not required to know how to operate a bobcat. In any event, operating a bobcat is only ancillary to the flatwork crew's main responsibility on the job – cement finishing.

Except for seeing employees in other units in the morning before going to the job sites, the flatwork crew members have little or no contact with other employees. They ride to the job site together, perform their specific tasks, and go to the next job site to perform those same tasks there. At best, the record shows only two instances of transfer from the flatwork crew to another crew. "Grade checkers" Caleb Fiscus and Aaron

⁶ In fact, at the hearing, Brian Carver frequently referred to flatwork crew members as "finishers."

Wellman transferred from, presumably, the flatwork crew to a wall crew and an excavating crew, respectively. This minimal amount of interchange, however, does not weaken the flatwork crew employees' community of interest.

Accordingly, I find that the flatwork crew is its own separate identifiable and functionally distinct group with its own community of interest and that the petitioned-for unit of flatwork crew employees is appropriate.

3. Excavating Crews, Operators/Drivers, Mechanic

Finally, the excavating crew employees, individual operators and drivers, and the mechanic constitute an identifiable and functionally distinct group with common interests distinguishable from other employees. The two-man excavating crews and the individual operator/drivers all perform discrete excavating and/or operating functions. These employees use track excavators, backhoes, bobcats, low boys, and various trucks to excavate the land, transport employees and haul equipment and debris.

I have included the mechanic in this unit based upon his community of interest with the excavating crew members and the operator/drivers. In this regard, the mechanic performs service and maintenance on all the equipment operated, and the trucks driven, by the operator/drivers. Although the mechanic usually performs this work in the shop, the evidence reveals that as much as 50% of his time is on the job site. In the latter circumstances, he undoubtedly would have frequent and sustained contact with the excavating crew employees and operator/drivers.

Conversely, excavating crew employees and operator/drivers have little or no contact with other employees, other than the morning meeting at the Employer's Bloomington facility. When the excavating crews and operator/drivers are on the job site, employees in the other units are performing work elsewhere. Based on the

foregoing, I find that the excavating crew, operator/drivers and the mechanic comprise a separate identifiable and functionally distinct group with a shared community of interest. Accordingly, I find that the petitioned-for unit, including the mechanic, is appropriate.⁷

II. DETERMINING SUPERVISORY STATUS

Petitioners variously assert that employees Pete Conlin, Chris Shanks and Robert Miller are supervisors within the meaning of Section 2(11) of the Act, apparently based on these individuals' status as working foremen.⁸ As discussed in detail below, I find that the Petitioners have not established that the working foremen are statutory supervisors. To provide context for the discussion of my conclusions, I first set forth the applicable law.

A. Applicable Law

The party asserting supervisory status has the burden of proving it by competent evidence. *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001); *Benchmark Mechanical Contractors*, 327 NLRB 829 (1999). To be classified as a supervisor, the individual in question must be acting in the interest of the employer, have authority to accomplish one of the enumerated functions listed in Section 2(11), and use independent judgment. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574,

⁷ As discussed above, if a petitioned-for unit is appropriate, the inquiry ends there and the Board need not scrutinize the Employer's proposals. See *Black and Decker Mfg. Co.*, 147 NLRB 825, 828 (1964); and *Dezcon, Inc.*, 295 NLRB at 111. However, even if I engaged in such scrutiny, based on the record, I would be hard-pressed to see how the employees, as grouped by the Employer, share a sufficient community of interest.

⁸ In addition, in its post-hearing brief, the Cement Masons assert for the first time that working foreman Chuck Westerfield is a statutory supervisor. The Cement Masons adduced no evidence at the hearing of Mr. Westerfield's supervisory status other than as it related to working foremen. However, based on my determination (discussed below) that there is no evidence to prove that working foremen are supervisors, I similarly find that Mr. Westerfield is not a supervisor within the meaning of the Act.

114 S.Ct. 1178 (1994).⁹ The analysis must differentiate between “the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact.” *Training School at Vineyard*, 332 NLRB No. 152, slip op. at 5 (2000). Where written or oral reports simply bring substandard performance to the Employer’s attention, and where an admitted supervisor conducts an independent investigation, the reporting individual’s role in advising the supervisor of conduct is merely a reportorial function and not supervisory. *Passavant Health Center*, 284 NLRB 887, 891 (1987).

The Board cautions frequently against construing supervisory status too broadly because an employee deemed to be a supervisor loses the Act’s protections. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999). Job title is not, in and of itself, dispositive of supervisory status under the Act. *Marukyo U.S.A., Inc.*, 268 NLRB 1102 (1984). Moreover, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory authority and a lack of evidence is construed against the party asserting supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Michigan Masonic Home*, 332 NLRB No. 150 (2000). Supervisory status will not be found when the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)

⁹ Section 2(11) of the Act defines the term “supervisor” as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

B. The Working Foremen

Each of the wall and flatwork crews has at least one working foreman. Tim Atkins, Pete Conlin, Caleb Fiscus, and David Rudisill are foremen of the wall crews. (Rudisill is foreman of the wall crew that is also referred to as the footing crew.) Chris Shanks is the foreman of two wall crews and Caleb Fiscus reports to him. Robert Miller and Chuck Westerfield are foremen of the flatwork crews. There are no foremen for the two-man excavating crews, the other operator/drivers, or the mechanic.

At the hearing, Brian Carver testified that the working foremen all have equal authority and that their primary responsibility is to keep the employees working and to reach the daily goals. He testified that all foremen report to him. Carver also testified that none of the working foremen, and specifically Pete Conlin, Chris Shanks and Robert Miller, have authority to make decisions regarding hiring, firing, suspension, time off, transfer and other decisions regarding employee status. He testified that only he and Ed Cushing have the authority to make these decisions.

Carver testified that the working foremen also do not have the authority to effectively recommend that an employee be hired, fired, disciplined or rewarded. Carver testified that although working foremen might report to him that an employee is disruptive, they usually do not make a recommendation of what should happen to the employee; rather, Carver makes that determination himself. For example, on one occasion, when working foreman Chris Shanks recommended that an employee be fired, Carver made his own assessment and fired the employee because the employee missed work, didn't call in and was late and disruptive.

Carver testified that no working foreman has ever recommended that an employee receive a raise, although they might comment favorably on that employee's performance at the time of that employee's performance review.

According to Carver, the foremen work 100% of their time alongside of the crew members. Other than Carver's testimony that the working foremen are responsible for keeping the employees working and trying to reach the daily project goals, there is no evidence that they direct the work of their crews. Carver testified that he gives all the employees their daily assignments and instructs the working foremen if any adjustments need to be made. Carver said that he usually visits every job site daily, but that if he can't, Ed Cushing will. Carver also said he communicates with the crews by radio or telephone. Carver testified that the jobs are very repetitious and, therefore, a supervisor does not need to be on every site, every minute, every day.

There is no evidence that working foremen, as a group, receive any special benefits. With the exception of Chris Shanks and David Rudisell, who are salaried, working foremen all receive "slightly more" in hourly wages than their crew members. For example, Pete Conlin, a wall crew working foreman, is paid about \$15.00/hour – in the middle of the wall crew hourly wage range of \$12.00 to 17.00. Carver computed Shanks' and Rudisell's salaries on an hourly basis and said Shanks receives about \$20.00 to \$22.00 an hour and Rudisell receives about \$16.00 to \$17.00 an hour. Thus, Rudisell's salary, on an hourly basis, is at the upper end of the wall crew wage range and Shanks' is well above it.

Three of the working foremen, Chris Shanks, David Rudisell, and Robert Miller drive company cars. The foremen receive no other benefits as a group or individually that are not available to the other employees.

C. Conclusion on Supervisory Status

Based on the record, and under the applicable law, I find that the working foremen as a group, and Pete Conlin, Chris Shanks, and Robert Miller, individually, are not supervisors within the meaning of the Act. There is no evidence that any of these individuals possess any of the criteria listed in Section 2(11) of the Act.

While the fact that one of the working foremen (Shanks) is salaried and paid at a higher rate than his crew members and that three the foremen (Shanks, Miller and Rudisell) drive company cars may militate in favor of finding them to be supervisors, these facts are not statutory indicia of supervisory status as set forth in Section 2(11). Similarly, although it could be argued that without finding the working foremen to be supervisors, there would only be one supervisor for 55 to 60 employees working in various parts of central Illinois, this ratio, like a higher wage and company car, are only secondary indicia of supervisory status. *Ken Crest Services*, 335 NLRB No. 63, slip op. at 3 (2001). In any event, the high ratio of employees to supervisors could be explained by the frequent telephone and radio communication between Brian Carver and the crews and the fact that, given the repetitious nature of the work, less on-site supervision is needed.

Without evidence of one of the statutory indicia of supervisory status, I cannot find that the working foremen as a group, or that Pete Conlin, Chris Shanks, and Robert Miller, individually, are supervisors within the meaning of Section 2(11) of the Act. Since Petitioners, the parties asserting supervisory status, have not met their burden of proving that the working foremen have the authority to carry out any of the actions set forth in Section 2(11) of the Act, or to effectively recommend such actions, I find the

working foremen are not statutory supervisors and I will include them in their respective crew units found appropriate herein.¹⁰

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.¹¹
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

¹⁰ Although not raised as an issue by any of the Petitioners, I will exclude flatwork crew employee Jerry Carver from the flatwork crew unit found appropriate herein. Jerry Carver is the father of Brian Carver, a 50% owner of the Employer. Even though the record shows that Jerry Carver does not receive any special privileges, Board policy requires the exclusion from the bargaining unit of a close relative of an owner of a closely-held corporation – even in the absence of evidence showing the employee has special job-related benefits. *NLRB v. Action Automotive Inc.*, 469 U.S. 490 (1985).

¹¹ The parties stipulated, and I find, that the Employer, an Illinois corporation, with an office and place of business in Bloomington, Illinois, is engaged in the business of excavation, foundation and flat concrete work for both residential and commercial customers. During the last calendar year, a representative period of time, the Employer purchased and received goods valued in excess of \$50,000 from a vendor located within the State of Illinois who in turn purchased these same goods from directly outside the State of Illinois. During this same period of time, the Employer received gross annual revenues in excess of \$500,000.

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All full-time and regular part-time flatwork employees employed by the Employer at its Bloomington and Champaign, Illinois facilities, but excluding all wall crew, footing crew and stripping crew employees, excavating crew employees, operator/drivers, mechanic, office and clerical employees, guards and supervisors as defined in the Act and all other employees.¹²

Case 33-RC-4724

All full-time and regular part-time wall crew, footing crew and stripping crew employees employed by the Employer at its Bloomington and Champaign, Illinois facilities, but excluding all flatwork crew employees, excavating crew employees, operator/drivers, mechanic, office and clerical employees, guards and supervisors as defined in the Act and all other employees.

Case 33-RC-4727

All full-time and regular part-time excavating crew employees, operator/drivers, and mechanic employed by the Employer at its Bloomington and Champaign, Illinois facilities but excluding all wall crew, footing crew and stripping crew employees, and flatwork crew employees, office and clerical employees, guards and supervisors as defined in the Act and all other employees.

¹² The Cement Masons' showing of interest is inadequate with respect to the unit found appropriate herein. As the appropriate unit is larger than that sought by the Cement Masons in its filed petition, the Cement Masons are hereby granted 10 days from the date of issuance of this Decision to establish a proper showing of interest in the unit found appropriate herein. Such showing of interest should be presented to the Board's Subregion 33 office in Peoria, Illinois. In the event that the Cement Masons have not established a proper showing of interest within 10 days, the petition in Case 33-RC-4723 shall be dismissed. If the Cement Masons do establish a proper showing of interest within that time, an election will be conducted according to the procedures set forth herein. If the Cement Masons do not wish to proceed with an election herein, it may withdraw its petition without prejudice upon a written notice to the Board's Subregion 33 office in Peoria within 7 days from the date of the issuance of this Decision. *Propane Transport, Inc.*, 247 NLRB 966, 969 (1980).

IV. DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. The employees in each unit will vote whether or not they wish to be represented for purposes of collective bargaining by:

Case 33-RC-4723

Operative Plasterers and Cement Masons Local Union #18 of Central Illinois

Case 33-RC-4724

Laborers' International Union of North America, Local 362

Case 33-RC-4727

International Union of Operating Engineers Local 649, AFL-CIO

The date, time, and place of the elections will be specified in the notices of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the

election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.¹³

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the elections should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office election eligibility lists with respect to each election, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of each list, I will make it available to all parties to the corresponding election.

¹³ Because the Employer is engaged in the construction industry, the eligibility of voters will be determined by the formula in *Daniel Construction Co.*, 133 NLRB 264 (1961), and *Steiny & Co.*, 308 NLRB 1323 (1992).

To be timely filed, the lists must be received in the 33rd Subregion, Hamilton Square, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602 on or before **October 8, 2002**. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file these lists. Failure to comply with this requirement will be grounds for setting aside the election(s) whenever proper objections are filed. The lists may be submitted by facsimile transmission at (309) 671-7095. Since the lists will be made available to all parties to the corresponding election, please furnish a total of **two** copies, unless the lists are submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the corresponding election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-

0001. This request must be received by the Board in Washington by 5 p.m., EST on **October 15, 2002**. The request may **not** be filed by facsimile.

Dated: October 1, 2002

Will Vance, Acting Regional Director
National Labor Relations Board, Subregion 33

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